

JAMES JONES, JR.
Claimant

THE BOEING COMPANY-WICHITA
Respondent

KEMPER INSURANCE COMPANY
Insurance Carrier

KANSAS WORKERS COMPENSATION FUND

ORDER

APPEARANCES

RECORD AND STIPULATIONS

ISSUES

(1) Whether the Kansas Workers Compensation Fund has any liability for an accidental injury to a handicapped employee which occurred on or after July 1, 1994.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidentiary record, considering the briefs and hearing the arguments of the parties, the Appeals Board finds as follows:

Prior to addressing the issue of the liability of the Kansas Workers Compensation Fund (Fund), the following is a summary of the essential facts of the case. Claimant worked for the respondent in several different job classifications, all requiring him to use his upper extremities in performing repetitive work activities and he began experiencing pain, numbness and tingling in his upper extremities. Commencing in 1991 respondent provided treatment through its in-house medical facility as well as by referral to outside physicians. Eventually respondent referred claimant to J. Mark Melhorn, M.D., a board-certified orthopedic surgeon, specializing in hand surgery, who treated the claimant conservatively from March 20, 1993 through July 6, 1993. Dr. Melhorn diagnosed bilateral tendinitis. Claimant was released on July 6, 1993 to return to regular work without restrictions and with no permanent functional impairment rating.

Claimant returned to work and his bilateral symptoms worsened. He returned to Dr. Melhorn for treatment on September 20, 1994. Dr. Melhorn took claimant off of work on October 10, 1994, for surgery on his right upper extremity consisting of carpal tunnel release, ulnar nerve release and de Quervain's release. On October 20, 1994, Dr. Melhorn also performed de Quervain's and cubicle tunnel surgery on the claimant's left wrist. Claimant was released to return to work on November 22, 1994 with permanent restrictions and a permanent impairment rating of eleven percent (11%) to the whole body.

The Administrative Law Judge found that the claimant had sustained no permanent functional impairment to his upper extremity prior to the day he was taken off work for surgery on October 10, 1994. Therefore, she found that the claimant's date of accident was October 10, 1994, the last day worked when the injury required claimant to leave work, following the rule announced in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). Although, in the instant case, claimant suffered several injuries, including carpal tunnel syndrome, all of the conditions were caused by micro-traumas and should be treated the same for workers compensation purposes as carpal tunnel syndrome. Condon v. The Boeing Co., 21 Kan. App. 2d 580, Syl. ¶ 1, 903 P.2d 775 (1995).

The Administrative Law Judge then addressed the Fund issue and found that since the claimant's date of accident was October 10, 1994, the Fund had no liability for claimant's injuries. The Administrative Law Judge concluded that K.S.A. 44-567(a)(1),(2) should be read together with K.S.A. 44-566a(e)(1). When these two statutes are read together, the Administrative Law Judge found that the language was clear that when the 1993 Legislature amended these statutes that it intended that the Fund would have no liability for claims arising on or after July 1, 1994.

The 1993 Kansas Legislature made numerous revisions in the Kansas Workers Compensation Act (Act) which is found at K.S.A. 44-501, et seq. These revisions became effective July 1, 1993. One of the sections of the Act that was affected by the 1993 changes were the provisions that shifted liability in certain instances from the employer to the Fund. The issue that is now before the Appeals Board is the result of the changes made by the 1993 Legislature in K.S.A. 44-566a(e)(1) and K.S.A. 44-567(a)(1),(2). Interpretation and the construction of these two statutes as amended by the 1993 Legislature and what effect the changes had on shifting liability from the employer to the Fund are the subjects that are now before the Appeals Board for review.

Section 61 of Senate Bill 307 amended K.S.A. 1992 Supp. 44-566a(e)(1) as follows:

“(e) The workers compensation fund shall be liable for:

“(1) Payment of awards to handicapped employees in accordance with the provisions of K.S.A. 44-569 and amendments thereto *for claims arising prior to July 1, 1994;*”

K.S.A. 1992 Supp. 44-567(a)(1),(2) was amended by Section 62 of Senate Bill 307 as follows:

“(a) An employer who operates within the provisions of the workers compensation act and who knowingly employs or retains a handicapped employee, as defined in K.S.A. 44-566 and amendments thereto shall be relieved of liability for compensation awarded or be entitled to an apportionment of the costs thereof as follows:

“(1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury *which occurs prior to July 1, 1994*, and the ~~director~~ *administrative law judge* awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the ~~workers'~~ *workers* compensation fund; and

“(2) subject to the other provisions of the workers compensation act, whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the ~~director~~ *administrative law judge* finds the injury probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the ~~director~~ *administrative law judge* shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award which is attributable to the employee's preexisting physical or mental impairment, and the amount so found shall be paid from the ~~workers'~~ *workers* compensation fund.”

Respondent agrees with the Administrative Law Judge and the Fund that it is clear that the 1993 Legislature, in Senate Bill 307, eliminated Fund liability for handicapped claimants whose resulting injury, disability or death, probably or most likely, would not have occurred but for the claimant's preexisting impairment. K.S.A. 44-567(a)(1). However, respondent asserts that the language of K.S.A. 44-567(a)(2) plainly and unambiguously provides for the continued shifting of liability to the Fund in “contribution” cases, regardless of the date of injury. It is the respondent's position that since the limiting language “which occurs prior to July 1, 1994” is only contained in Subsection (1), the “but for” subsection, that Subsection (2) the “contribution” subsection, remains in effect after July 1, 1994. The respondent goes on to argue that an ambiguity does not exist that requires juridical construction of these statutes. Respondent contends that if the legislature had intended

for the limiting language to apply to both subsections, it would have specifically added such language to Subsection (2).

Other changes were made by the 1993 Legislature in Subsection (1) and Subsection (2) in addition to adding the limiting language. The legislature removed the period at the end of Subsection (1), substituted a semicolon for the period and added the coordinating conjunction "and." Subsection (2) was revised by changing the first letter of this separate sentence from an uppercase capital letter to a lowercase small letter. Respondent argues that these changes only created a compound complex sentence where two sentences previously existed. Respondent also opines that the addition of the word "and" was no more a substantive change than any other grammatical revision made in 1993, e.g., the word *workers'* changed to *workers*.

On the other hand, the Fund argues that the amendments made to K.S.A. 44-567(a)(1),(2) clearly demonstrate that the limiting language added to Subsection (1), "which occurs prior to July 1, 1994", equally applies to Subsection (2). The Fund asserts that the 1993 Legislature, when it added the coordinating conjunction "and" between the subsections, joined the two subsections, thus intending for the limiting language to apply not only to Subsection (1) but also to Subsection (2). The Fund further argues that the limiting language added in 1993 to K.S.A. 44-566a(e)(1), "for claims arising prior to July 1, 1994", further clarifies that the 1993 Legislature intended for Fund liability to be eliminated on or after July 1, 1994. This statute goes on to list the situations where Fund liability remains in effect without any limiting language. K.S.A. 44-566a(e)(2)-(5) specifies that Fund liability remains for employer insolvency, payment of medical and temporary total disability benefits, payment of actual expenses of the Commissioner of Insurance for the administration of the Fund, and any other disbursements as provided by law.

The Fund makes a further analysis in support of its position by referring to an annual report made by the Workers Compensation Fund Oversight Committee (Oversight Committee) to the legislating coordinating counsel on Fund issues. The Oversight Committee was created by the 1993 Legislature and is found at K.S.A. 46-2401. The Oversight Committee's first annual report addressed the issue of the 1993 Legislature's failure to include the July 1, 1994 limitation in Section (2) K.S.A. 44-567(a). The Oversight Committee's report rejected a proposal to amend the statute concluding that the 1993 Legislature, in Senate Bill 307, clearly abolished Fund liability for injuries to handicapped workers from and after July 1, 1994. Another issue the Oversight Committee addressed in this annual report was whether or not to reinstate the Fund for injuries to handicapped employees. The Oversight Committee concluded that Fund liability should not be reinstated. The Fund asserts that since the Oversight Committee addressed the issue concerning reinstatement of the Fund, that this is a further indication that the 1993 Legislature intended to eliminate Fund liability by the 1993 amendments.

The Appeals Board has made a careful analysis of the statutory changes made by the 1993 Legislature contained in Senate Bill 307 and what effects such changes had on Fund liability for injured claimants with preexisting impairments. The Appeals Board agrees with both respondent and the Fund that there is no question that Senate Bill 307, due to the limiting language added to K.S.A. 44-567(a)(1), eliminated Fund liability for cases involving handicapped employees whose injury, disability or death after July 1, 1994 would not have occurred but for the employee's preexisting impairment. The controversy that has risen concerns Subsection (2) of this statute and whether the same limiting language, "which occurs prior to July 1, 1994", was intended by the 1993 Legislature to apply to this subsection which imposes Fund liability when the handicapped employee's preexisting impairment only contributes to the injury, disability or death.

In determining the construction and interpretation of a particular statute, the Kansas Appellate Courts have announced numerous principles to follow. The Appeals Board finds that the statutes that are the subject of this appeal, K.S.A. 44-566a(e)(1) and K.S.A. 44-567(a)(1)(2), should be construed keeping in mind that the fundamental rule of statutory construction is that the purpose and intent of the legislature governs. Davis v. City of Leawood, 257 Kan. 512, 893 P.2d 233 (1995); In re Tax Appeal of Collingwood Grain, Inc., 257 Kan. 237, 891 P.2d 422 (1995). When an existing law is revised, it is presumed that the legislature intended to change the law. Galindo v. City of Coffeyville, 256 Kan. 455, 885 P.2d 1246 (1994); Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). It is also presumed that the legislature did not intend to enact useless or meaningless legislation. Todd v. Kelly, 251 Kan. 512, 837 P.2d 381 (1992).

Before Senate Bill 307 amended Subsection (1) and Subsection (2) of K.S.A. 1992 Supp. 44-567(a), these two subsections stood alone as two separate sentences. The Appeals Board finds that the grammatical changes made by the 1993 Legislature resulted in changing two separate sentences with one or more independent clauses into a compound complex sentence. See William A. Sabin, The Gregg Reference Manual, p. 23, ¶ 135, 7th ed., 1995. The semicolon that was substituted for the period was used instead of a comma because the independent clauses contained internal commas and a misreading might occur if a comma were used to separate the clauses. *Id.* at 39, ¶ 177. The Appeals Board finds that the reason these subsections were changed from two separate sentences to one compound complex sentence was to apply the limiting language contained in Subsection (1) also to Subsection (2). If the 1993 Legislature intended only for the limiting language to apply to Subsection (1) and not to Subsection (2), then the Legislature would have simply left the subsections as separate sentences without any other changes.

The Appeals Board also finds that the addition of the words, “for claims arising prior to July 1, 1994”, to K.S.A. 44-566a(e)(1) further supports the argument that Fund liability for injured handicapped employees on or after July 1, 1994, was eliminated by the 1993 Legislature. K.S.A. 44-566a(e)(1)-(5) enumerates specific situations where the Fund is required to make payments pursuant to the Act. The only change that the 1993 Legislature made in this list was Subsection (1) which specified when the Fund was liable for payments under the Act for awards to handicapped employees. The words “for claims arising prior to July 1, 1994”, were added to this sentence. The Appeals Board finds that the 1993 Legislature, by adding this language, clearly intended to eliminate all Fund payments for awards in situations that involved injuries to handicapped employees occurring on or after July 1, 1994.

The respondent cites a number of other sections of the Act that it argues would also have been changed if the legislature had intended for Fund liability for injured handicapped employees to cease on or after July 1, 1994. For example, the respondent argues that K.S.A. 44-569a, which generally provides for Fund reimbursement to the employer or insurance carrier for disability compensation or furnished medical treatment to the extent the Fund is determined to be liable, would have included the limiting language if Fund liability would have been eliminated as of July 1, 1994. The Appeals Board disagrees with this analysis and finds that the other statutes that provide for either how or when Fund payments are to be made were not eliminated on or after July 1, 1994, because the Fund remained liable for all the other Fund payment situations that are contained in K.S.A. 44-566a(e)(2)-(5) and for injuries to handicapped employees that occurred before July 1, 1994.

Finally, if K.S.A. 44-566a(e)(1) and K.S.A. 44-567(a)(1),(2) were to be construed so that the Fund remained liable after July 1, 1994 for "contribution" cases and not for "but for" cases, the amendments would be useless and meaningless. Respondents would have the opportunity to obtain opinions from medical experts which would now contain opinions that an injured claimant's preexisting condition contributed up to one hundred percent (100%) of the handicapped employee's injury, disability or death. Consequently, the elimination of Subsection (1) "but for" situations would have little or no effect on assessment of Fund liability for handicapped employees. Also, there is no reasonable rationale to justify the elimination of Fund liability in "but for" cases but retain it for "contribution" situations.

The Appeals Board concludes that the revisions made by the 1993 Legislature in K.S.A. 44-566a(e)(1) and K.S.A. 44-567(a)(1),(2) eliminated Fund liability as of July 1, 1994 for handicapped employees in both "but for" and "contribution" cases. Any other interpretation or construction of these two statutes would have an unreasonable result.

In the instant case, the Administrative Law Judge, after finding that the claimant's date of accident was October 10, 1994 and that the Fund had no liability for claims after July 1, 1994, went on to find the Fund liable for all medical expenses incurred in this case prior to July 1, 1994. The Appeals Board finds that the Administrative Law Judge erred in assessing liability to the Fund for the medical expenses prior to July 1, 1994. The date of accident in this case was found to be October 10, 1994. Having found that the Fund had no liability for injury to handicapped employees after July 1, 1994, the Appeals Board finds that the Fund cannot be liable for medical expenses incurred prior to this date. Accordingly, the Appeals Board finds that the Fund has no liability for any workers compensation benefits paid or costs incurred in this case.

The Appeals Board adopts the Administrative Law Judge's reasoning and affirms her finding that the Fund's request for attorney fees should be denied.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award entered by Administrative Law Judge Shannon S. Krysl dated August 21, 1995, should be, and hereby is, affirmed as to the benefits awarded to the claimant, James Jones, Jr., and against the respondent, The Boeing Company-Wichita and Kemper Insurance Company for an accidental injury which occurred on October 10, 1994.

WHEREFORE, it is the further finding, decision and order of the Appeals Board that the Award entered by Administrative Law Judge Shannon S. Krysl dated August 21, 1995, should be, and hereby is, affirmed as to the finding that the Fund has no liability for injuries to handicapped employees on or after July 1, 1994. However, the Award is reversed as to the finding of the Administrative Law Judge that the Fund has liability for all medical expenses incurred prior to July 1, 1994.

All other findings and orders of the Administrative Law Judge are incorporated herein and made a part of this Order as if specifically set forth to the extent they are not inconsistent with the findings and conclusions expressed herein.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with his counsel is hereby approved.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid direct as follows:

Ireland Court Reporting	
Transcript of Regular Hearing	\$246.00
Deposition of J. Mark Melhorn, M.D.	\$135.60
Deposition Services	
Deposition of Kenneth D. Zimmerman, M.D.	\$277.60

IT IS SO ORDERED.

Dated this ____ day of January 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis Phelps, Wichita, Kansas
 Frederick L. Haag, Wichita, Kansas
 J. Philip Davidson, Wichita, Kansas
 Shannon S. Krysl, Administrative Law Judge
 Philip S. Harness, Director